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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/612,754	07/01/2003	Thomas W. Mower	14564.37.1	5557

7590 09/15/2009  
JOHN C. STRINGHAM  
WORKMAN, NYDEGGER & SEELEY  
1000 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, UT 84111

EXAMINER
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SHEIKH, HUMERA N

ART UNIT	PAPER NUMBER
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1615

MAIL DATE	DELIVERY MODE
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09/15/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/612,754	<b>Applicant(s)</b> MOWER ET AL.	
	<b>Examiner</b> Humera N. Sheikh	<b>Art Unit</b> 1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 10 June 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,3,4,8-23 and 26-29 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3,4,8-23 and 26-29 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                       | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>06/18/09</u> .  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### **Status of the Application**

Receipt of the Response and Amendment after Non-Final Office Action filed 06/10/09 and the Information Disclosure Statement (IDS) filed 06/18/09 is acknowledged.

Applicant has overcome the following rejection(s) by virtue of the amendment to the claims and/or persuasive remarks: (1) The 35 U.S.C. §112, second paragraph rejection of claims 1, 5-8, 20 and 23-29 has been withdrawn; (2) The 35 U.S.C. §103(a) rejections over Su et al. (US Pat. Pub. No. 2002/0068102 A1), Fischer et al. (USPN 5,433,965), Downton et al. (USPN 5,411,755) and Yegorova (USPN 6,387,370) has been withdrawn.

Claims 1, 3-4, 8-23 and 26-29 are pending in this action. Claims 1, 3, 8, 13-23 and 26-29 have been amended. Claims 2, 5-7, 24 and 25 have been cancelled. Claims 13-19 and 21-22 which were previously withdrawn (see Response to Restriction dated 07/21/06) based on non-elected invention have now been rejoined and examined with the elected invention, based on the amendment to these claims, which replaces “noni puree concentrate” with “noni fruit”. Claims 1, 3-4, 8-23 and 26-29 remain rejected.

\* \* \* \* \*

### ***Information Disclosure Statement***

The information disclosure statement (IDS) submitted on 18 June 2009 was filed after the mailing date of the Non-Final Office Action on 01/23/09. The submission is in compliance with the provisions of 37 CFR 1.97. Accordingly, the information disclosure statement is being considered by the examiner.

\* \* \* \* \*

***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1, 3-4, 8-23 and 26-29 are rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for a dietary supplement comprising each of the following ingredients: (1) noni fruit; (2) Luo Han Guo powder; (3) Luo Han Guo liquid extract; (4) raspberry concentrate and/or (5) blueberry concentrate; (6) natural lemon flavor; (7) xanthan gum; (8) sodium chloride; (9) citric acid and (10) water, does not reasonably provide enablement for a dietary supplement without the recitation of the inclusion of the following four ingredients - (6) natural lemon flavor; (7) xanthan gum; (8) sodium chloride; (9) citric acid. The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention commensurate in scope with these claims.

A review of the instant specification, particularly Examples 1-6 at pages 22-25 indicates that the instant dietary supplement requires each of ingredients (1)-(10) listed above. As presently recited, the instant claims do not include recitation of the natural lemon flavor, xanthan gum, sodium chloride and citric acid, which the instant specification demonstrates is needed to obtain the instant dietary supplement formulation and which is required in the present specification language to practice the invention. Each of Examples 1-6 requires the additional four ingredients (labeled as (6)-(9)). Thus, these ingredients (labeled as (6)-(9)) are shown to be a critical feature to achieve the instant dietary formulation end product and consequently should

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be included in the present claim language. It is not abundantly clear how one would practice the invention without the presence of the natural lemon flavor, xanthan gum, sodium chloride and citric acid, as stated and exemplified by the working examples. The disclosure, including all of the examples describes the dietary formulation as requiring the additional ingredients (6)-(9), ((in addition to ingredients (1)-(5) and (10)), which are currently not recited in the present claims. Applicants are disclosing essential features of the invention without recitation thereof in the instant claims. Accordingly, the specification does not reasonably provide enablement for a dietary supplement without the recitation of the inclusion of the four ingredients - (6) natural lemon flavor; (7) xanthan gum; (8) sodium chloride; (9) citric acid, in addition to the inclusion of ingredients (1)-(5) and (10).

\* \* \* \* \*

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1, 3-4, 8-23 and 26-29 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 2, 4 and 7 of copending Application No. 11/173,611 ('611 Application). Although the conflicting claims are not identical, they are not patentably distinct from each other because the '611 Application also claims a liquid mineral and vitamin dietary supplement comprising vitamins, minerals, high-ORAC fruit juice(s), water and Momordica (Luo Han Guo) in effective amounts.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

\* \* \* \* \*

#### ***Response to Arguments***

Applicant's arguments, see Response (pages 9-12) filed 06/10/09, with respect to the 35 U.S.C. §112, second paragraph rejection of claims 1, 5-8, 20 and 23-29 and the 35 U.S.C. §103(a) rejections over Su et al. (US Pat. Pub. No. 2002/0068102 A1), Fischer et al. (USPN 5,433,965), Downton et al. (USPN 5,411,755) and Yegorova (USPN 6,387,370) have been fully considered and are persuasive. The 35 U.S.C. §112, second paragraph rejection of claims 1, 5-8, 20 and 23-29 has been withdrawn based on the amendment to the claims. In addition, the §103(a) rejections of claims 1-12, 20 and 23-29 have been withdrawn.

\* \* \* \* \*

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

--No claims are allowed at this time.

### **Correspondence**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Humera N. Sheikh whose telephone number is (571) 272-0604. The examiner can normally be reached on Monday-Friday during regular business hours.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward, can be reached on (571) 272-8373. The fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have any questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Humera N. Sheikh/

Primary Examiner, Art Unit 1615

*hns*

September 12, 2009